Supreme Court, U.S.
FILED
OCT 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS

EVANS & DIXON
RALPH C. KLEINSCHMIDT
GERRE S. LANGTON
314 North Broadway
St. Louis, Missouri 63102
314-621-7755
Attorneys for Appellees

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Appellees' Motion to Dismiss	1
The Case and Issue	2
There is No Substantial Federal Question	3
Conclusion	9

Table of Authorities

Cases:

Califano v. *Goldfarb,* 430 U.S. 199 (1977)	3,6,7
Califano v. *Webster,* 430 U.S. 313 (1977)	3,5
Califano v. *Westcott,* U.S. , 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979)	3,8
Ferguson v. *Skrupa,* 372 U.S. 726	9
Frontiero v. *Richardson,* 411 U.S. 677 (1973)	3,6,8
Gantner v. *Fayette Brick & Tile Co.,* 236 S.W.2d 415 (Mo.App. 1951)	7
Kahn v. *Shevin,* 416 U.S. 351 (1974)	3,4,5,9
Orr v. *Orr,* U.S. , 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979)	8
Schlesinger v. *Ballard,* 419 U.S. 498 (1975)	3
Weinberger v. *Wiesenfeld,* 420 U.S. 636 (1975)	3,6,7

Constitution and Statutes:

U.S. Constitution, amend. XIV 2

Mo. Const., art. I, section 2 2

Mo. R.S., 1976 Supp., section 287.240 2,3,4,7,9

Mo. R.S., 1969, section 287.290..... 6

Other Authority:

U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: a Data Book*, 1977 Bulletin, 1977, Table 39 5

U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: a Data Book*, 1977 Bulletin, 1977, Table 41 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

v.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLEES' MOTION TO DISMISS

APPELLEES' MOTION TO DISMISS

Appellees, Druggists Mutual Insurance Company and Dicus Prescription Drugs, Inc., move pursuant to Rule 16(b) of the Rules of the Supreme Court of the United States, that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial federal question.

THE CASE AND ISSUE

This is an appeal from the decision of the Supreme Court of Missouri rejecting appellant's contention that Section 287.240 (4) R.S.Mo., 1976 Supplement, a part of Missouri's Workmen's Compensation Act, denies a widower equal protection of the law afforded by the Constitution of the State of Missouri, Article I, Section 2, and Amendment 14, United States Constitution.

Section 287.240(2)[1] requires that when an injury due to a work related accident causes the death of an employee, the employer pay to the total dependents of the employee a death benefit. Subsection 4 defines the word dependent to mean "a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of injury." The statute creates three classes of persons who are conclusively presumed to be dependent upon the employee for support. They are: a wife upon a husband legally liable for her support, a husband mentally or physically incapacitated from wage earning upon a wife (§ 287.240 (4)(a)), and a child under age 18 upon a parent (§ 287.240 (4)(b)).

Appellant was the husband of Ruth Wengler, whose death was caused by a work related injury. Appellee Dicus Prescription Drugs, Inc. was Mrs. Wengler's employer. Appellee Druggists Mutual Insurance Company is the employer's workmen's compensation insurer, and under Missouri law is primarily liable for payment of benefits. Appellant has stipulated that he was not dependent for support in whole or in part upon the wages of his wife at the time of her death, nor was he mentally or physically impaired from earning wages.

[1] The full text of Section 287.240 is printed in the Jurisdictional Statement, pp. A-28 through A-31.

The workmen's compensation referee and, upon review, the Missouri Labor and Industrial Relations Commission denied appellant's claim for compensation. Upon appeal, the Circuit Court of Madison County, Missouri, reversed, holding that § 287.240 denied appellant equal protection of the law because the act afforded a conclusive presumption of dependency to widows and not to widowers. Subsequently, the Missouri Supreme Court reversed the judgment of the Circuit Court, holding that § 287.240 (4) did not deprive appellant of the equal protection of the law. Appellant then appealed to this Court.

There is No Substantial Federal Question

The Missouri Supreme Court's decision directly follows this Court's decision in *Califano* v. *Webster,* 430 U.S. 313, 51 L.Ed.2d 360, 97 S.Ct. 1192 (1977); *Schlesinger* v. *Ballard,* 419 U.S. 498, 42 L.Ed.2d 610, 95 S.Ct. 572 (1975); *Kahn* v. *Shevin,* 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1737 (1974). And contrary to appellant's assertions, the decision of the Missouri Supreme Court in this cause is in harmony with and does not conflict with this Court's decision in *Califano* v. *Westcott,* U.S. , 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979); *Orr* v. *Orr,* U.S. , 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979); *Califano* v. *Goldfarb,* 430 U.S. 199, 51 L.Ed.2d 270, 97 S.Ct. 1021 (1977); *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 43 L.Ed. 2d 514, 95 S.Ct. 1225 (1975); *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L.Ed.2d 583, 93 S.Ct. 1764 (1973).

The Missouri Supreme Court recognized that to withstand scrutiny under the equal protection clause, the different classification afforded widowers under § 287.240 (4) must serve an important governmental objective and must be substantially related to the achievement of those objectives. (Jurisdictional Statement, Appendix, p. A-4).

The Missouri Supreme Court after studying the Missouri Legislature's intent in passing § 287.240 (4) specifically found that "the purpose of the conclusive presumption of dependency was to satisy a perceived need widows generally had, which need was not common to men whose wives might be killed while working." (Jurisdictional Statement, Appendix, p. A-10) The court then stated:

> "***The governmental objective was to require employers to alleviate the economic hardship resulting from a working spouse's death. The hardship was seen by the legislature as more immediate and pronounced on women than on men. Statistics cited by the United States Supreme Court in Kahn v. Shevin, supra, appear to hear this out even today, and the claimant here has not shown any evidence or presented any empirical data to the contrary." [Juris. Statement, Appendix, pp. A-10, A-11]

The Court concluded:

> "***In our opinion, the substantive difference in the econimic standing of working men and women justifies the advantage that § 287.240 (4)(a) administratively gives to a widow." [Juris. Stat., Appendix, p. A-11]

Thus, the Missouri Supreme Court followed the decision of this Court in *Kahn* v. *Shevin,* supra, where this court upheld the constitutionality of a Florida statute which granted a tax exemption to widows and not widowers for the reason that the differing treatment of widows and widowers rested upon a difference having a fair and substantial relation to the object of the legislation. In this Court's opinion, the Florida tax law was reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes the heaviest burden. It was clear to this Court then that "there could be no dispute that the financial difficulties confronting the lone women in Florida or in any other state exceeded those

facing men. Whether from overt discrimination or from socialization process of a male dominated culture, the job market is inhospitable to the women seeking any but the lowest paid jobs." *Kahn* v. *Shevin,* 416 U.S. at 353, 40 L.Ed. at 192.

The status of working women in the work force has not materially changed since the Court decided *Kahn* v. *Shevin.* In 1975, medium annual earnings of fulltime female workers was $7,504.000 and that of a man was $12,631.00. Thus a woman had a medium income in 1975 which was only 59.4% of the medium for men. U.S. Department of Labor, Bureau of Labor Statistics, *U.S. Working Women: A Data Book,* 1977 Bulletin, 1977, Table 39. The data relied upon by this Court in deciding *Kahn* v. *Shevin* indicated that in 1972 a woman had a median income which was only 57.9% of the median for males. *Kahn* v. *Shevin,* 416 U.S. at 353, 40 L.Ed.2d 192, n. 5 and 6. In March 1976, in families where the wife was employed fulltime, the median percent of family income accounted for by her earnings was 38.8%. In families where the wife was employed part-time, the median percent of family income accounted for by her earnings was 11.8%. U.S. Department of Labor, *U.S. Working Women,* supra, Table 41. This data reinforces the conclusion that the loss of the husband's wages fall more disparately upon the widow than does the loss of the wife's wages upon the widower.

The Missouri court's decision was also influenced by this Court's holding in *Califano* v. *Webster,* supra, that a gender-based difference which benefitted women by requiring fewer number of elapsed years for women to acquire old age insurance benefits under the Social Security Act than that required for men to qualify, was not violative of the Equal Protection Clause. The difference in treatment was justified by past discrimination against women in employment.

On the other hand, the Missouri Supreme Court properly found that this Court's decision in *Califano* v. *Goldfarb,* supra, *Weinberger* v. *Wiesenfeld,* supra, and *Frontiero* v. *Richardson,* supra, were not controlling in the present case because the latter cases are distinguishable on their facts. [Juris. Stat., Appendix, pp. A-8 and A-9]. In *Califano* v. *Goldfarb,* this Court characterized the Social Security System as a "program of social insurance". Under the System, covered employees paid taxes into the fund to purchase protection for old age. This Court's principal concern was that the section discriminated against the female wage earner who paid taxes into the fund by providing her family with less protection than that provided a male wage earner. 40 U.S. at 208, 51 L.Ed.2d 276, 277. The Missouri Workmen's Compensation Law is not a system of social insurance financed through taxation. The benefits provided by the Act are substitutional of the injured employee's common law and statutuory rights and remedies in favor of the injured employee or his or her dependents for accident which occur in the course of employment. (Jurisdictional Statement, Appendix, p. A-9) The employee does not contribute to the System. In fact, the Act provides that no part of the cost of the insurance shall be assessed against, collected from or paid by any employee. Section 287.290, R.S. Mo. 1969.

The present case is further distinguishable from *Goldfarb* in that under the Social Security Act, the widower had to show that he had received one-half of his support from his wife at the time of her death, to be eligible for benefits. Under Missouri Workmen's Compansation Statute, a widower who in fact suffers loss of support because of his wife's death due to a job-related injury, is compensated. (Juris. Stat., Appendix, p. A-11).

The advantage given widows under the Missouri Workmen's Compensation Act is more than just administrative. The Act

assures full benefits to widows even though they are only partially dependent upon their husbands.[2] Thus, the effect is to assure full death benefits to those widows who may not have been totally dependent upon their husbands and would have been entitled to only partial benefits. These are the women the Missouri Legislature thought to benefit by the conclusive presumption. [There probably was no presumption on the part of the Missouri Legislature that the insignificant number of non-dependent widows, who received benefits, were needier than non-dependent widowers, who do not.]

This Court's decision in *Weinberger* v. *Wiesenfeld,* supra, can be distinguished for the same reason that *Goldfarb* is distinguishable. The "mothers' benefits" afforded widows and totally denied widowers discriminated against women wage earners who had contributed to the System because their spouses were denied benefits when a male wage earner's spouse was afforded benefits. Furthermore, in the *Weisenfeld* case, this Court found that the purpose of the Legislation was not to compensate women beneficiaries as a group for economic difficulties which still confront women who seek to support themselves, but was intended to permit women to elect not to work and devote themselves to the care of children. 420 U.S. at 650, 43 L.Ed. at 525, 526.

---

[2] Section 287.240(2) excludes payment of benefits to a partial dependent where there are total dependents. Section 287.240(3) provides for payments to partial dependents of an injury employee of death benefits, determined by the proportion of the employee's contribution to all partial dependents by the employee at the time of the injury, which are paid by the employer to each of the dependents proportionally. If a widow is required to show that she is dependent upon her husband, this is what would happen where she could only establish partial dependency: if a husband contributes $200.00 of his $400.00 monthly earnings to his wife for her support, his wife would be entitled to $200/$400 or 50% of the total death benefits due. See *Gantner* v. *Fayette Brick & Tile Co.,* 236 S.W.2d 415 (Mo.App. 1951).

In *Frontiero* v. *Richardson,* supra, the offending gender based classification which required the female member of the military service to show that her husband was dependent upon her for more than one-half of his support in order to qualify for quarters allowance and dependent medical and dental benefits, but presumed that male members' spouses were dependent is distinguishable from the present case. In *Frontiero,* the disparate treatment between male and female personnel in no way compensated a female for past disparate economic treatment. The Missouri Supreme Court has found tht the information available to the Missouri Legislature about the conditions of women in Missouri in the 1920's and 1930's supported the concept that a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower. This need persists today. [Juris. Stat., Appendix, p. A-10]. Thus, there is a valid reason for treating widows and widowers differently in the present casee, which was lacking in the *Frontiero* case.

The same analysis can be applied to *Califano* v. *Westcott,* U.S. , 61 L.Ed.2d 382, 99 S.Ct. 2655 (1979). In *Westcott,* the statute provided benefits to families whose dependent children had been deprived of parental support because of the father's unemployment, but did not provide such benefits when the mother was unemployed. There was no contention that the purpose of the legislation was to compensate for the disparity between the economic capabilities of a man or a women.

In *Ore* v. *Ore,* U.S. , 59 L.Ed.2d 306, 99 S.Ct. 1102 (1979), Alabama's statutes which provide that husbands and not wives may be required to pay alimony upon divorce discriminated against those males who because of their financial circumstances were in need of support. Missouri Workmen's

Compensation Law compensates all widowers who are mentally and physically incapacitated from earning a living, and those who can actually show that they were dependent in part or in whole upon their wife for support. Thus, entitlement is not denied needy males under the Missouri law while it was denied needy males under the Alabama statutes.

The Missouri Supreme Court, in holding the Missouri Statute constitutional, found that the different treatment afforded widows in assuring them benefits whether totally, partially or non-dependent upon their spouses without a drawn-out proceeding serves an important governmental objective—that of alleviating the economic hardship resulting from a working spouse's death, a hardship that was more immediate and pronounced on women than on men. In reaching this conclusion, the Supreme Court of Missouri recognized that the Missouri Legislature must strike a delicate balance in deciding the amount of compensation it would require employers to pay upon injury to employees, resulting in death. This Court has uniformly recognized that the courts will not substitute their social and economic beliefs for the judgment of the legislative body which was elected to pass laws. *Kahn* v. *Shevin,* supra, 416 U.S. 356, n. 9, citing *Ferguson* v. *Skrupa,* 372 U.S. 726, 730 10 L.Ed.2d 93, 83 S.Ct. 1028, 95 ALR 2d 1347.

CONCLUSION

The classification adopted by the Missouri Legislature in enacting 287.240 (4)(a) of the Missouri Workmen's Compensation Statutes, is well within the permissible limits long recognized by this Court. The contention that as applied to appellant it denies the equal protection of the laws in violation of the Fourteenth Amendment presents no substantial federal ques-

tion. Appellees' motion to dismiss the appeal should therefore be sustained.

Respectfully submitted,
EVANS & DIXON
RALPH C. KLEINSCHMIDT
GERRE S. LANGTON
314 North Broadway, 16th Floor
St. Louis, Missouri 63102
314-621-7755
Attorneys for Appellees

October 1979